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Supreme Court, U.S.
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No. 97-1328

In The

Supreme Court of the United States

October Term, 1997

JAMES BARLOW FAMILY LIMITED PARTNERSHIP, *et al.*,

Petitioners,

vs.

DAVID M. MUNSON, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Petitioners' statement of the questions presented conveys the incorrect impression that the parties to this litigation were also parties to the settlement agreement referenced in petitioners' first question. Since neither the petitioners nor respondent was a party to the settlement agreement relied upon by petitioners, respondent believes that the issues presented are more properly stated as follows:

1. Was the Tenth Circuit Court of Appeals correct in ruling that settlement agreements entered into between the United States on the one hand, and certain mining claimants (the Ertls and Marathon) on the other, did not adversely affect the property rights of respondent, which was not a party to either agreement?

2. Was the Tenth Circuit Court of Appeals correct in following the precedent of this Court in *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 334-35 (1906), that "A patent from the United States operates to transfer the title, not merely from the date of the patent, but from the inception of the equitable right upon which it is based?"

STATEMENT PURSUANT TO RULE 29.6

Respondent has no parent company and no nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

Petitioners brought this action to obtain payments of amounts (approximately $470,000) they assert are due from respondent Munson as overriding royalty interest payments under certain federal oil and gas leases. Munson responded by asserting that the federal oil and gas leases from which petitioners' claims derive are invalid. Munson asserted instead that private leases issued by certain oil shale mining claimants (the Ertls and Marathon Oil Company) to Munson are the valid, operative instruments under which royalties are payable. Petitioners own no interests in those private leases. Munson's position was based upon the fact that the Secretary of the Interior issued valid mining patents to the Ertls and Marathon covering the lands included in the federal leases relied upon by petitioners.

The Tenth Circuit ruled that issuance of the patents established conclusively as a matter of law that the federal oil and gas leases upon which petitioners rely were void *ab initio*, and that the Marathon and Ertl leases, upon which Munson relies, were valid. The Tenth Circuit also rejected petitioners' assertions that the terms of a settlement agreement reached between the Ertls and the United States somehow preserved petitioners' overriding royalty interests.

In the proceedings below the petitioners asserted that the terms of a separate settlement agreement reached between Marathon Oil Company and the United States also preserved their overriding royalty interests. The Tenth Circuit rejected this contention as well, treating both the Ertl and Marathon agreements in the same fashion. Before this Court petitioners have abandoned the Marathon portion of their appeal without explaining why the Ertl settlement agreement serves to preserve their claims, while the Marathon agreement does not.

Petitioners assert (at p. 2) that the Tenth Circuit's decision "raises critical questions about the validity and enforceability of the settlement" of various oil shale cases, and that it "is a radical departure from the law of other Circuits." Neither assertion is correct. In truth, the only effect of the decision is to confirm the rather ordinary proposition that royalty payments are not owed under invalid oil and gas leases. None of the parties to the settlement agreements relied upon by petitioners are before this Court complaining about the outcome or rationale of the Tenth Circuit's decision. No portion of the decision departs from the law of the Tenth Circuit, this Court, or any other circuit court of appeals.

FACTUAL AND LEGAL BACKGROUND

The Tenth Circuit's decision in this case rests upon the simple fact that Munson obtained oil and gas leases from the Ertls and Marathon at a time when those two private parties owned the oil and gas estate to the lands at issue. In the time period in which Munson obtained these leases (1977-1980), Munson could not be certain that the Ertls and Marathon owned the oil and gas estate, because their mining claims to these lands were being contested. However, by 1992, when petitioners filed this lawsuit, those contests had been fully and finally adjudicated.

The outcome of those adjudications was that the Secretary of the Interior issued mining patents under the Mining Resources Act of May 10, 1872, ch. 152, 17 Stat. 92 (codified as amended at 30 U.S.C. § 22-24, 26-30, 33, 34, 37, 39-42 (1982)) to the Ertls and Marathon. The legal consequences which flow from issuance of a mining patent under the 1872 Act are fixed, and easily ascertainable by reference to any standard mining law treatise.

Patents issued under the 1872 Act reserve no minerals. 30 U.S.C. § 22, *et seq.* The patent may convey no conditions not authorized by law. *Deffeback v. Hawke*, 115 U.S. 392, 405-6 (1885); *South Dakota v. Andrus*, 614 F.2d at 1193 n.3, *cert. denied*, 449 U.S. 822 (1980) (quoting *United States v. Kosanke Sand Corp.*, 12 IBLA 282, 290-1 (1973)). The patent may convey no more and no less than Congress authorizes in the mining statutes, regardless of the language of the patent. *2 Amer. L. Min.*, § 30.06[5]. A reservation in the patent that is not authorized is inoperative. *2 Amer. L. Min.*, § 9.02.

The Secretary is not authorized to issue a patent until satisfied that the applicant meets all criteria. *2 Amer. L. Min.*, § 51.03. The issuance of the patent adjudicates the validity of the claim. *2 Amer. L. Min.*, § 54.05.

The issuance of the patent divests the United States of the legal title and merges the legal title with the equitable title already held by the patentee. *Marathon Oil Co. v. Lujan*, 751 F. Supp. 1454, 1468 (D. Colo. 1991), *aff'd in part, rev'd in part*, 937 F.2d 498 (10th Cir. 1991). The patentee's title relates back in time to the date of the original location and terminates the rights of subsequent claimants to the lands. *Deffeback*, 115 U.S. 392, 405-6 (1885); *Reed v. Munn*, 148 F. 737, 757 (8th Cir. 1906), *cert. denied*, 207 U.S. 588 (1907); *2 Amer. L. Min.*, §§ 30.06[5], 54.01[2].

Here the "subsequent claimants to the lands" at issue consist of the United States (which issued federal oil and gas leases to the lands in 1970, some fifty years after the mining claimants had acquired equitable title to the oil and gas estate) and the petitioners (who acquired those federal leases, then assigned them, reserving the overriding royalty interests which form the basis for their claims in this litigation).

In the 1977-80 time period, following normal practices recommended by title lawyers when an operator desires to lease lands that are subject to unpatented mining claims, Munson obtained separate oil and gas leases, one set issued by the federal government, the other by the mining claimants. At the time it did so, it knew that one of the two chains of title was valid, the other was not. If patents issued, that would — under the legal principles cited above — conclusively confirm that at the time of leasing (*i.e.* 1977-1980) the mining claimants owned valid title to the interests they leased. Thus, issuance of the patents would serve to confirm the validity of Munson's "private" leases.

In this sense, issuance of a patent is analogous to issuance of a judicial decree of quiet title, not to execution and delivery of a deed of assignment. Just as a judicial decree doesn't *create* rights, but instead serves to *confirm* and document in a binding fashion the nature of rights that previously existed, so too does the issuance of a patent serve the same function.

Patents did issue. That fact served to confirm — finally and conclusively — the pre-existing fact that neither the federal government nor the petitioners owned any rights in the oil and gas estate at the time when the federal leases were issued. As a consequence, Munson declined to honor claims for payment that derived from this invalid chain of title.

THE TENTH CIRCUIT CORRECTLY RULED THAT TWO SETTLEMENT AGREEMENTS DID NOT ADVERSELY AFFECT MUNSON'S PROPERTY RIGHTS

Petitioners fundamentally misconstrue the Tenth Circuit's decision in this case as an attack upon, and a failure to enforce, the Ertl/United States settlement agreement. In truth, the Tenth Circuit decision recognized the settlement agreement for what

it is: a two party contract, binding on the parties who executed it. Where the Tenth Circuit parts company with the petitioners is where the petitioners insist that this two-party contract serves to take away property rights not owned by either of the contracting entities.

Accordingly, when the Secretary of Interior agreed to issue patents to the claimants, the Tenth Circuit decision recognizes the binding nature of this promise. Where the settlement agreement specifies that "the form of the patents to be issued . . . shall be that of a standard mining claim patent granting the Claim owners fee ownership of the entire claim," then the Tenth Circuit recognizes that too as a binding obligation of the Secretary. Where the agreement obligates the Claimowners "by special warranty deed [to] convey to the United States all interest in the oil, gas and coal present within such claim," then the Tenth Circuit acknowledges that this was a binding obligation of the Ertls. So too, when the Ertls "waive any right to recover rents or royalties paid to the United States prior to the date of execution of this Agreement, or accruing to the United States thereafter," the Tenth Circuit acknowledged that this provision had the binding effect of preserving intact the United States' rights to royalty payments, past, present and future.

However, where this two-party contract sought to appropriate property rights to the United States which were not owned by either the Ertls or the United States, the Tenth Circuit ruled that such efforts have no legally binding effect. Thus, the Tenth Circuit recognized that § 1.2 of the settlement agreement, which states "[t]he United States shall have and retain full title to (fee ownership of) the oil, gas and coal present within each of the Subject Claims," cannot have the effect of authorizing the United States to "have and retain full title to" property already owned by Munson.

This two-party settlement contract can no more treat Munson's leasehold right in this fashion than it can "agree" to allow the United States to "have and retain full title to" Munson's office furniture or bank accounts. Accordingly, when the Tenth Circuit refused to rule that Munson's property rights were negated by these provisions, it was not undermining "the finality and enforceability of settlement agreements generally." Petition at 7. All the court was doing was recognizing the proper legal consequences that flow from the agreement, while disregarding any illegal consequences intended by the parties.

THE TENTH CIRCUIT DECISION PROPERLY APPLIED THIS COURT'S "RELATION BACK" DOCTRINE.

Petitioners argue that property rights granted under patents issued by the United States should vary, dependent upon the "equities and circumstances involved." Petition, p. 10. The Tenth Circuit properly rejected this novel contention, adhering instead to the precedent of this Court by ruling that "the rights accorded holders of such unreserved patents are clear." P. App. at 7a.

Under petitioners' view of property law, a title examiner who reviews an abstract containing a mining patent issued under the 1872 Act would not be able to ascertain from the public record what property rights are owned by the patentee and its successors in interest. Instead, to glean what these rights are the examiner would be required to know all of the "equities and circumstances involved" in the underlying claim, and to guess how a court might ultimately view these "equities."

Under the Tenth Circuit's view of property law,

> when a mining claim has been perfected under the law, it is in effect a grant from the United States of

> the exclusive right of possession to the same. It constitutes property to its fullest extent, and is real property subject to be sold, transferred, mortgaged, taxed and inherited without infringing any right or title of the United States.

P. App. at 8a (citing *United States v. Etcheverry*, 230 F.2d 193, 195 (10th Cir. 1956)).

The mining claims involved in this case were perfected prior to 1920. The Tenth Circuit followed the holding of this Court in *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 334-35 (1906), in ruling that "a patent from the United States operates to transfer title, not merely from the date of the patent, but from the inception of the equitable right upon which it is based." P. App. at 8a. The Tenth Circuit decision pointed out that under its (and this Court's) precedents, the effect of this rule of property law is that "upon issuance of a patent, title *relates back* to the date of original entry," and "the consequence of relation back is that the claimant's rights and those of the claimant's assignee date from the time the claim was made, not from the time the patent was issued." *Id.*

Thus, the Tenth Circuit's decision makes it apparent that the "relation back" doctrine is not some kind of judge-made law, to be applied or not as a judge sees fit. It is instead a way that courts have explained the rights of a patentee whose title emanates from the 1872 Act. The rights that are explained by the "relation back doctrine" stem from Congress, not from the judiciary. Throughout the entire history of the 1872 Act (one that now spans well over half of the history of this country) not a single court that has ever considered the question has entered a final judgment that fails to apply the principle underlying the "relation back doctrine."

The difficulties that would ensue if this Court were to accept the invitation of petitioners to overturn this 136-year string of unbroken precedent are well illustrated by the facts of this case. Petitioners insist that "equities" and "circumstances" entitle them to escape the results of "mechanically" applying the relation back doctrine. The nature of petitioners' "equities" does not appear in the petition, and escaped the notice of the Tenth Circuit when it considered this case.

Petitioners consist of various entities that are successors-in-interest to professional oil and gas lease brokers, or are themselves professional oil and gas exploration and production companies. In 1970-71 petitioners acquired their interests in federal oil and gas leases for a nominal filing fee and $1/acre rental payment under a "simultanous filing program" that was legislated out of existence in 1987. *See Law of Federal Oil and Gas Leases*, ch. 6, Rocky Mtn. Min. L. Found. (Linnea M. Simons & Karen K. Kaiser eds., Sept. 1995) for a description of how this lease application system operated.

The United States does not warrant title to its oil and gas leases because it recognizes that the prior location and maintenance of a valid mining claim divests the United States and its lessees of the right to develop the oil and gas. *See Law of Federal Oil and Gas Leases* § 3.10 and § 21.08[3]. Consequently, a federal lessee assumes the responsibility for verifying title to federal oil and gas leases, and protecting its leasehold interest against any clouds on title. John E. Holtzinger and Arvin M. Kramish, Note, *Multiple Mineral Development of Public Lands*, 24 Geo. Wash. L. Rev. 319, 329 (1956).

The problems posed by unpatented mining claims are well known in the oil and gas industry, and common methods of dealing with these problems have evolved. The most common solution is to obtain protective leases from the mining claimants.

George J. Morgenthaler, *Oil and Gas Title Examination*, at 123-24 (1982). In this case, although the petitioners were all experienced brokers in federal oil and gas leases, they did not undertake any protective measures. Several years later, when Munson acquired interests in the area, it was not so haphazard in its approach. As the Tenth Circuit decision notes, "faced with this uncertainty of title, Munson prudently acquired both private and federal oil and gas leases." P. App. at 3a.

It was because petitioners neglected to obtain protective leases that ownership of two competing chains of title diverged, and thereby gave rise to this litigation. When they first acquired their federal oil and gas leases the petitioners possessed the full power and ability to protect their royalty claims by following prudent oil-field practices. Having failed to do so, the petitioners possess no "equities" whatsoever. Certainly their claims do not warrant grant of the extraordinary remedy they are now seeking — the reversal of long-settled property law principles to bail them out of the consequences of their own failure to act.

CONCLUSION

The decision of the Tenth Circuit properly applies the 1872 Act, the precedents of this Court, and the precedents of all circuit courts of appeal that have dealt with mining law issues. There is no basis for reversing that decision, thus the petition for writ of certiorari should be denied.

Respectfully submitted,

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